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No. 87-91

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

GEORGE BREWSTER

Petitioner

v.

MOUNT VERNON HOSPITAL, et al.

Respondents

OPPOSITION OF RESPONDENT HEALTH CARE PROVIDERS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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OPPOSITION OF RESPONDENT HEALTH CARE PROVIDERS TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

COME NOW respondents, The Mount Vernon Hospital, Burlington Maguire, M.D. (Donald Burlington, M.D.), Robert H. Robertson, M.D., Nooreddin Mirmirani, M.D., Ann Fortescue, Jill Inskeep, Bernadette Lester, Millie Wright and Sarah Fogelson (hereinafter "health care providers"), by their respective counsel, and present this their opposition to the petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit, stating as follows:[1]

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[1] Although Linda Anderson is listed as a party by Mr. Brewster, she never was served in the district court and no order of the district court referred to her from which Mr. Brewster could appeal.

QUESTION PRESENTED

Where health care providers administer psychiatric care/evaluation to a patient, following a civil temporary detention order, are they acting under color of law such that they may be liable for an alleged violation of the patient's civil rights?

STATEMENT OF FACTS

On July 23, 1983, Mr. Brewster telephoned a Fairfax County Magistrate, David A. Hetzer, concerning a pending indecent exposure charge against Mr. Brewster (App. 6, 54).[2] During the conversation, Mr. Brewster indicated to Magistrate Hetzer that he was threatening harm to himself (App. 54). Magistrate Hetzer

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[2] All references of this nature are to the appendix filed in the Fourth Circuit.

thereupon summoned the Fairfax County Police, who responded by sending police officers to pick up Mr. Brewster and transport him to The Mount Vernon Community Mental Health Center for mental evaluation by the various health care providers (App. 7).

While the original communication to the police officers was oral, it was followed by a written civil mental temporary detention order within a few hours (App. 14). Mr. Brewster arrived at the hospital at approximately 7:00 a.m. The health care providers were advised of his threats to harm himself (App. 54). He was observed for a period of three (3) days at which time he was discharged following a court order with a diagnosis

of schizophrenic disorder, chronic undifferentiated type (App. 92).[3]

LAW AND ARGUMENT

I.

PETITIONER'S CLAIM THAT VIRGINIA CODE SECTION 37.1-67.1 IS UNCONSTITUTIONAL IS NOT BEFORE THIS COURT

For the first time in this case, Mr. Brewster is now claiming that Virginia Code Section 37.1-67.1 (Repl. vol. 1984) is unconstitutional and deprived him of due process. The respondent health care providers submit that whether that code section is unconstitutional or not, does

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[3] In his statement of the case, Mr. Brewster alleges that he was given "mind altering drugs" and kept in "solitary confinement." While the health care providers deny any claimed or implied mistreatment of Mr. Brewster while at The Mount Vernon Community Mental Health Center, such allegations are not material to the issue of whether these health care providers acted "under color of state law."

not effect their status in this case, since they were not acting under color of law, as discussed infra. Since Mr. Brewster has raised this issue for the first time in his petition, it should not be considered by this Court. Tennessee v. Dunlap, 426 U.S. 312, 316, 96 Sup. Ct. 2099, 2101 (1976); Adickes v. S.H. Kress & Co., 398 U.S. 144, 147, 90 Sup. Ct. 1598, 1602-03 (1970).[4]

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[4] Interestingly, Mr. Brewster claimed that the procedures for obtaining the order under Virginia Code Section 37.1-67.1 were not followed by the respondents (Mr. Brewster's Brief of Appellant in the Fourth Circuit Court of Appeals, p. 9).

II.

HEALTH CARE PROVIDERS ADMINISTERING PSYCHIATRIC CARE TO A PATIENT, FOLLOWING A CIVIL TEMPORARY DETENTION ORDER, ARE NOT ACTING UNDER COLOR OF LAW AND THEY ARE NOT LIABLE FOR AN ALLEGED VIOLATION OF THE PATIENT'S CIVIL RIGHTS

The sole basis for federal jurisdiction in this case is an alleged violation of 42 U.S.C. § 1983 by the various respondents, both health care providers and police officers. While there is no dispute that the police officers acted under color of law in taking Mr. Brewster into custody pursuant to the direction of Magistrate Hetzer, this is not true of the health care providers.

In an attempt to establish that the health care providers acted under color of state law, Mr. Brewster alleged that "each and all of the acts of defendants were done by defendants not as private

individuals but under the color and pretense of the statutes, ordinances, regulations, customs and usages of the Commonwealth of Virginia and the County of Fairfax, under the authority of . . . doctors and nurses acting under pretense of law . . . (App. 6). Examination of Mr. Brewster's complaint, however, reveals that he failed to allege sufficient facts to support his contention that the health care providers acted under color of state law. In paragraphs three (3) and four (4) of the complaint, Mr. Brewster alleges that The Mount Vernon Hospital is partly financed by government funds and that the other health care providers, nurses and physicians, are also paid with government funds (App. 5). The only reference to Nooreddin Mirmirani, M.D., by name, is in paragraphs four (4) and twenty-nine (29)

of the complaint. The sole allegation against him (other than payment with government funds) is that he "stated" that he was "plaintiff's doctor" and that he "had commenced to write prescriptions for more drugs but upon complaint of plaintiff modified the order" (App. 10, 11). Indeed, paragraph thirty (30) of the complaint states that plaintiff was not forced "to take any more drugs" after Dr. Mirmirani's appearance (App. 11). Yet, this negligible involvement in Mr. Brewster's care by Dr. Mirmirani is claimed to amount to state action under 42 U.S.C. § 1983.

Burlington Maguire, M.D. (Donald Burlington, M.D.) is alleged to have acted under color of state law by his simple act of signing The Mount Vernon Community Mental Health Center admission order (App. 8).

In paragraphs twenty (20) and twenty-one (21) of the complaint, Mr. Brewster alleges that Dr. Robertson prescribed certain drugs which were later administered to him (App. 9).

In paragraph sixteen (16) of the complaint, Mr. Brewster alleges that he was interrogated by Ann Fortescue, R.N., and that he told her that he did not wish to remain at the hospital (App. 8).

In paragraph eighteen (18) of the complaint, Mr. Brewster alleges that Jill Inskeep took him to room 12 on the third floor of the hospital building (App. 8) and he alleges in paragraph twenty-one (21) of the complaint that Millie Wright, R.N. administered drugs to Mr. Brewster against his will (App. 9). The sole allegation against Bernadette Lester, R.N. and Sarah Fogelson, R.N. is that

they were employees of the hospital (App. 5).

In this case, Mr. Brewster was present in The Mount Vernon Community Mental Health Center to be evaluated concerning his mental health. Mr. Brewster was not the subject of a commitment proceeding as he seems to suggest by repeated references to cases involving rights of a person being formally committed (Petition at 12-13, 26-27). The decisions cited by Mr. Brewster involve, for the most part, whether a particular state commitment procedure comported with federal constitutional due process, e.g. In Re Gault, 387 U.S. 1, 87 Sup. Ct. 1428 (1967). They do not address the issue of due process in the civil temporary detention proceeding such as authorized by Virginia Code Section 37.1-67.1 (Repl. vol. 1984). More importantly, those cases do not even

address the issue of whether there was state action or color of law acts by the individual defendants. Indeed, those decisions involved commitments to state institutions.

The purpose of Virginia Code Section 37.1-67.1 is not to formally commit an individual to a mental institution or facility, but instead to provide for medical evaluation of individuals to determine <u>if</u> commitment proceedings should be undertaken. The health care providers were not present to imprison Mr. Brewster, but to apply their medical judgment to evaluate his mental status. Of course, Mr. Brewster was present at the hospital and was not permitted to leave voluntarily. However, as in the case of medical treatment of a prison inmate, the purpose for which he was there was not custodial, but rather so

that the physicians and hospital staff could exercise their independent medical judgment in determining his mental status. Mr. Brewster made no allegation that anything other than medical judgment would be involved in this determination.

Moreover, the factual allegations in the complaint belie Mr. Brewster's argument that the health care providers restrained him. Aside from the conclusory allegation in paragraph sixteen (16) of the complaint that "the plaintiff was unlawfully detained by the policemen and by the above-mentioned hospital employees" (App.8), the facts alleged against the health care providers concern only the alleged wrongful provision of psychiatric medical care. Rather than showing that the health care providers exercised supervisory or custodial functions, Mr. Brewster's allegations

reveal that the health care providers functioned solely as providers of psychiatric care and evaluation.

This situation is very similar to that which occurred in Calvert v. Sharp, 748 F.2d 861 (4th Cir. 1984) cert. den., 471 U.S. 1132, 105 Sup. Ct. 2667 (1985). The Fourth Circuit held that health care providers who treat prison inmates, and who are not direct employees of the state or prison, are not acting under color of law when they exercise their independent medical judgment in treating prisoners. The Calvert court reasoned that the state action requirement of 42 U.S.C. § 1983 was not meant to encompass what is essentially medical care/evaluation of an individual. Such a function is not traditionally the exclusive prerogative of the state.

In his petition, Mr. Brewster cites the decision of Morrison v. Washington County, Alabama, et al., 700 F.2d 678 (11th Cir. 1983). However, this decision not only does not support his argument, it supports the health care provider's position of non-state action. In Morrison the Eleventh Circuit concluded that a hospital may have acted under color of law where physician judgments were the product of non-medical considerations, i.e., how to get rid of a unruly patient. Id. at 683.

By contrast, the present case involved the allegation that the health care providers gave Mr. Brewster drugs which he did not want and which caused adverse reactions. He did not claim that the drugs were given for any non-medical reason or, for that matter, that any of the treatments/evaluations performed were

for non-medical purposes. This case thus becomes one of claimed medical malpractice.[5]

The decision of Malak v. Associated Physicians, Inc., 784 F.2d 277 (7th Cir. 1985) is inapposite since the hospital/ defendant was conceded to be a publicly owned hospital and the individual employee/officials of the hospital therefore were held to be state actors.

In Robb v. City of Philadelphia, 733 F.2d 286 (3th Cir. 1984), the issue was whether a private citizen (Mann) acted in concert with city officials to deny the plaintiff (Robb) a promotion. It was

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[5] It should be noted that Mr. Brewster is currently pursuing a medical malpractice claim against some of these same respondent health care providers in the Fairfax County, Virginia Circuit Court, George Brewster v. Robert H. Robertson, M.D., At Law No. 71766 and George Brewster v. The Mount Vernon Hospital, et al., At Law No. 71767.

clear that the granting and/or denying of promotions for city employees such as Mann, was a city function. Yet, through the influence of Mann the city substituted the judgment of Mann for its own.

However, as was pointed out in Calvert, supra., medical judgment by private physicians are not the exclusive prerogative of the state. In the present case the health care providers' sole purpose was to provide medical evaluation of Mr. Brewster.

Furthermore, as the Robb court observed in commenting upon this Court's decision of Lugar v. Edmonson Oil Company, 457 U.S. 922, 102 Sup. Ct. 2744 (1982):

> [T]o the extent that petitioner challenged the constitutionality of the statute, he presented a valid cause of action; he did not insofar as he alleged only misuse or abuse

> [of] the statute because there was no state action.

733 F.2d at 291.[6]

Likewise, the worst that can be construed from Mr. Brewster's original complaint is that the health care providers allegedly abused their medical judgment.[7]

Mr. Brewster had originally placed great emphasis on the claimed funding of The Mount Vernon Hospital partially through government funds. While he has

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[6] As noted earlier in this opposition, Mr. Brewster never challenged the constitutionality of this statute in his complaint, the district court hearings or in the Fourth Circuit.

[7] This Court should also consider the practical chilling effect of a decision holding health care providers in this type of situation to be state actors. Health care providers are overwhelmed enough at this time with medical malpractice suits, much less the added exposure of civil rights claims such as this. Holding them liable for such claims will discourage health care providers from providing such services.

apparently modified that position on appeal, he contends that the health care providers cooperated with the police to detain him. However, as this Court observed in Blum v. Yaretsky, 457 U.S. 991, 102 Sup. Ct. 2777 (1983), a medically based judgment is not transformed into state action simply because the state regulates the activities of the health care providers, such as in Medicaid patients. 457 U.S. 991, 1009, 102 Sup. Ct. 2777, 2788. More closely analogous to the case sub judice is that presented in the decision of Hall v. Quillen, 631 F.2d 1154 (4th Cir. 1980). In Hall a court appointed psychiatrist was alleged to have acted under color of law with a judge and court appointed legal counsel to cause the plaintiff's involuntary commitment. Both the lawyer and the psychiatrist contended that there

was no federal jurisdiction over them since they were not acting under color of law, vis-a-vis the plaintiff. The Fourth Circuit concluded that in rendering professional services to an individual pursuant to a commitment procedure, the health care provider is not acting under color of law. Similarly, this Court determined in Polk County v. Dodson, 454 U.S. 312, 102 Sup. Ct. 445 (1981) that a publicly appointed and paid public defender was not acting under color of law in his representation of an indigent defendant. This Court concluded that "the decisions made by the public defender in the course of representing his client were framed in accordance with professional canons of ethics, rather than dictated by any rule of conduct imposed by the state." Likewise, while the health care providers in this case

were authorized to evaluate Mr. Brewster, their decisions were dictated by medical considerations, not by any regulations imposed by the state.

CONCLUSION

The allegations in the complaint clearly reveal that Mr. Brewster has failed to establish that the health care providers acted under color of state law. For these reasons, the petition fails to present a sufficient basis for granting of a writ, and these respondent health care providers request that the petition be denied.

Respectfully Submitted,

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